

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULES 16,)	
26, 26.1, 33, 34, 37, and 45, ARIZONA)	Supreme Court No. R-06-00__
RULES OF CIVIL PROCEDURE)	
_____)	

Pursuant to Arizona Supreme Court Rule 28, George L. Paul, Robert H. McKirgan, and Robert G. Schaffer respectfully petition this Court to adopt amendments to Rules 16, 26, 26.1, 33, 34, 37 and 45 of the Arizona Rules of Civil Procedure as set forth in Appendix A hereto and described in greater detail below. The proposed amendments substantially incorporate recent amendments to the Federal Rules of Civil Procedure concerning “electronically stored information,” which will become effective December 1, 2006, absent contrary Congressional action. The proposed amendments to the Arizona Rules of Civil Procure are necessary to address challenges in litigation created by the proliferation of electronically stored information and also to bring the Arizona rules into conformity with their federal counterparts.

1. Introduction

The discovery process is undergoing substantial transformation. Until recently, the discovery process was relatively straightforward: lawyers and parties combed through documents for relevance and privilege. Once found, relevant

documents were physically preserved in anticipation of litigation and later produced in discovery. But computer systems and the resulting electronic storage of information have drastically changed the way business is conducted. Indeed, many say that 97% of all information in business and society is created and remains in the “digital realm.” With the vast amount of information existing outside the paper world, the Arizona Rules of Civil Procedure should be updated to reflect this changing dynamic.

2. The Proposed Federal Rules

On Wednesday, April 12, 2006, the United States Supreme Court approved, without comment or dissent, the entire package of proposed amendments to the Federal Rules of Civil Procedure concerning the discovery of “electronically stored information.” The package includes revisions and additions to Federal Rules 16, 26, 33, 34, 37, and 45, as well as Form 35. The proposed amendments were transmitted to the Supreme Court last September, after the Judicial Conference unanimously approved them. Absent Congressional action, they will become effective on December 1, 2006.

3. Conformity With The Federal Rules

The Arizona Rules of Civil Procedure have historically incorporated most of the provisions of the Federal Rules of Civil Procedure. Since the promulgation of

the Arizona rules, there has been a conscious effort to maintain this uniformity. Daniel J. McAuliffe and Shirley J. Wahl, 2 ARIZ. PRAC., CIVIL TRIAL PRACTICE § 2.4 (2d ed. 2006); *Edwards v. Young*, 107 Ariz. 283, 284 (1971); *Byers-Watts v. Parker*, 199 Ariz. 466, 469 (App. 2001). Uniformity of practice in both state and federal courts is useful to parties and practitioners and serves to reduce unnecessary uncertainty, expense and delay that is occasioned by different rules and requirements. Indeed, the September 2005 Report of the Judicial Conference Committee on Rules of Practice and Procedure noted that without national rules on the issue of electronic discovery, local jurisdictions would soon develop a “patchwork” of requirements, only further complicating the matter. The proposed amendments would further the goal of achieving procedural uniformity both within Arizona and among state and federal courts in this important area.

4. There Is Substantial Support Within The Legal Community For The Proposed Amendments

As the public comment period for the proposed federal amendments showed, there is wide support for adopting the proposed changes. The Litigation Section of the American Bar Association, the Federal Bar Council, the Commercial and Federal Litigation Section of the New York State Bar Association and the Department of Justice all submitted comments in general support of the amendments. Report of the Judicial Conference Committee on Rules of Practice

and Procedure, 25 (Sept. 2005). The Civil Rules Advisory Committee approved all but two of the proposed amendments unanimously. And both the Standing Committee on Rules of Practice and Procedure and the Judicial Conference approved the package of rules changes unanimously.

5. Specific Proposed Amendments

In substance, the proposed amendments will create guidelines for discovery of electronically stored information within the established discovery framework. The amendments are designed to create and maintain consistency for discovery of all types of information. Absent such guidelines, courts would (and already have started to) develop unique requirements and standards for electronic discovery. Not only do these amendments establish consistency throughout the state of Arizona, they also ensure consistency between the Arizona and Federal Rules of Civil Procedure.

Proposed Rule 16(b)(1) reflects amendments to Federal Rule 16(b). In United States District Court, judges are required to enter scheduling orders in most civil matters. The newly amended Federal Rules provide that such scheduling orders may include provisions regarding the disclosure or discovery of electronic information as well as any agreements the parties reach for asserting claims of privilege or protection as to trial-preparation material after production. Early

attention to these matters establishes a greater likelihood that discovery will proceed orderly and cost-effectively. In Arizona, Rule 16(b) authorizes courts to schedule a comprehensive pretrial conference and to enter scheduling orders. Accordingly, the proposed change to Rule 16(b)(1) establishes that courts may include provisions for disclosure or discovery of electronically stored information and agreements of the parties for asserting claims of privilege or work-product protection after production in any order it deems appropriate.

Proposed Rule 26(b)(1) adopts amendments to Federal Rule 26(b)(2). The proposed amendment to Rule 26(b)(1) responds to distinctive problems encountered in discovery of electronically stored information. Unlike the more familiar discovery of paper documents, electronically stored information may be difficult to access or may be searched only with considerable effort. Proposed Federal Rule 26(b)(2) authorizes a party to respond to a discovery request by identifying sources of electronically stored information that are not reasonable accessible because of undue burden or cost. If the requesting party seeks discovery from such sources, the responding party has the burden to show that the sources are not reasonably accessible. Even if that showing is made, the court may order discovery if – after considering the limitations established by present Rule 26(b)(2) – the requesting party shows good cause. The court may specify conditions for the

discovery, including the shifting of all or part of the costs associated with the discovery to the requesting party. The proposed amendment to Rule 26(b)(1) of the Arizona Rules of Civil Procedure incorporates these changes to the Federal rules.

Proposed Rule 26.1(a)(8) and (9) reflects amendments to Federal Rule 26(a)(1)(B). Arizona Rule 26.1 already requires parties promptly to disclose the existence and location of tangible evidence or relevant documents. The proposed additions to Rule 26.1(a)(8) and (9) explicitly identify “electronically stored information” as one of the items requiring automatic and prompt disclosure.

Proposed Rule 26.1(f) adopts amendments to Federal Rule 26(b)(5). Because of the sheer volume of electronic documents, discovery of electronically stored information is often more costly than conventional discovery. The proposed amendment to Federal Rule 26(b)(5) attempts to address this problem by setting up a procedure to assert privilege and work-product protection claims after production. The proposed amendment to Rule 26.1(f) incorporates this process into the state counterpart to Federal Rule 26(b)(5).

Proposed Rule 33(c) reflects amendments to Federal Rule 33(c). Arizona Rule 33(c) provides that a party may respond to an interrogatory by identifying relevant business records and affording the requesting party an opportunity to

inspect those records. The proposed amendments to Rule 33(c) is intended to make clear that the option to produce business records or make them available for examination includes “electronically stored information.”

Proposed Rule 34 reflects amendments to Federal Rule 34. Arizona Rule 34 governs the production of documents and things in discovery. The proposed amendments to Rule 34(a) adds “electronically stored information” as a category subject to production, in addition to “documents.” The proposed amendments to Rule 34(b) add procedures for requesting and objecting to the form for producing such information and to provide “default” forms of production. Both of these changes track the proposed modifications to Federal Rule 34.

Proposed Rule 37(g) adopts the amendment to Federal Rule 37(f). Arizona Rule 37 addresses the imposition of sanctions for failure to make disclosure or discovery. Because electronic information systems are complex and often result in the routine modification, overwriting, and deletion of information that attends normal use of such systems, the proposal creates a new subsection to Rule 37 governing the imposition of sanctions for the loss of certain types of electronically stored information. New Rule 37(g) provides limited protection against sanctions for a party’s inability to provide electronically stored information in discovery

when that information has been lost as a result of “routine, good-faith operation of an electronic information system.”

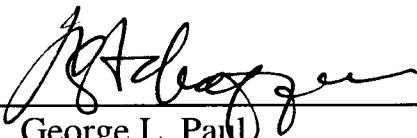
Proposed Rule 45 reflects amendments to Federal Rule 45. The proposed amendments to Rule 45 bring Rule 45 into conformity with the other amendments addressing electronically stored information.

6. Conclusion

For the reasons set forth above, the undersigned petitioners respectfully petition this Court to amend Rules 16, 26, 26.1, 33, 34, 37 and 45 of the Arizona Rules of Civil Procedure as set forth in Appendix A below. The proposed rules are intended to address problems in discovery resulting from the exponential growth in electronically stored information. In addition, the proposed amendments will further the goal of maintaining uniformity between the Arizona and Federal Rules.

RESPECTFULLY SUBMITTED this 1st day of November, 2006.

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